United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. BIRDAIR, INC., Respondent.	OSHRC Docket No. 10-0838

APPEARANCES:

Tina D. Juarez and Mia F. Terrell, Attorneys; U.S. Department of Labor, Dallas, TX
For Complainant

Michael V. Abcarian and Isabel Andrade Crosby, Attorneys; Fisher & Phillips, L.L.P., Dallas, TX
For Respondent

ORDER

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

On February 3, 2011, Birdair Inc. ("Birdair") served a subpoena on Cellco Partnership d/b/a Verizon Wireless seeking the personal cellular phone records of the compliance officer ("CO") who investigated Birdair on behalf of the Occupational Safety and Health Administration ("OSHA"). The Secretary filed a motion to revoke the subpoena on February 14, 2011, based on the government informer's privilege and the Privacy Act, and Birdair filed its response on February 23, 2011. In both a February 25, 2011 conference call and a March 17, 2011 written order, Administrative Law Judge James R. Rucker denied the Secretary's motion and ordered the

Secretary to produce the phone records but, based on privacy considerations, granted her leave to redact all references to phone calls unrelated to the investigation.[1]

The Secretary petitioned the Commission for interlocutory review of the judge's rulings under 29 C.F.R. § 2200.73(a)(2), renewing her argument that the informer's privilege protects the CO's phone records from disclosure. In its response to the Secretary's petition, Birdair argued that the informer's privilege does not apply to the phone records, but even if it did, Birdair's substantial need for the records would overcome the privilege. On April 1, 2011, the Commission granted the Secretary's petition and stayed the judge's order pending resolution of the petition. For the following reasons, we vacate the judge's February 25, 2011 oral ruling and March 17, 2011 written order denying the Secretary's motion, and direct the judge to grant the Secretary's motion.

Informer's Privilege

The Commission has long recognized the applicability of an informer's privilege in its proceedings. *Stephenson Enters., Inc.*, 2 BNA OSHC 1080, 1082-83, 1973-1974 CCH OSHD ¶ 18,277, p. 22,401-02 (No. 5873, 1974), *aff'd*, 578 F.2d 1021 (5th Cir. 1978). The informer's privilege is the government's right "to withhold from disclosure the identity of persons furnishing information on violations of the law to law-enforcement officers," including OSHA compliance officers. *Donald Braasch Constr., Inc.*, 17 BNA OSHC 2082, 2083, 1995-1997 CCH OSHD ¶ 31,259, p. 43,865 (No. 94-2615, 1997) (citation omitted). The purpose of the privilege is to protect the identity of informers, and thus it protects a communication to the extent that its contents would reveal the informer's identity. *Id.* Here, the Secretary relies on Commission precedent to assert the privilege, arguing that to protect informers from retaliation the CO's phone records must be protected because phone numbers can easily be traced to identify the individual informers.

Based on our review of the parties' arguments in light of applicable precedent, we find that the judge erred in requiring the Secretary to release the CO's phone records. The Secretary may invoke the informer's privilege to prevent disclosure of the identity of individuals who assist in OSHA investigations. *See Roviaro v. United States*, 353 U.S. 53, 59 (1957); *Donald*

[1] The judge issued his written order as directed by the Commission in its March 11, 2011 order granting the Secretary's request for a stay of the judge's oral ruling. In his written order, the judge summarily denied the Secretary's motion without addressing the parties' arguments.

Braasch, 17 BNA OSCH at 2083, 1995-1997 CCH OSHD at p. 43,865. In this case, the Secretary has correctly asserted the privilege to protect all of the individuals, other than Birdair supervisors, who assisted the CO in her investigation and to whom the CO promised confidentiality. Contrary to Birdair's contention, application of the informer's privilege is not limited to only those who asserted that Birdair had violated OSHA requirements. Indeed, the circuit court decision on which Birdair relies to support its claim specifically rejected the argument that the privilege is not so broad as to apply to "person[s] who give[] information" and limited "only to those who give negative or complaining information." *See Brock v. On Shore Quality Control Specialists*, 811 F.2d 282, 283-84 (5th Cir. 1987) ("The same interests that militate against divulging the names of 'informers' militate equally against divulging the names of 'those who have given information,' " and " 'the purpose for allowing the informers privilege [—]to make retaliation impossible'[—] . . . remains intact even where a list of informers is included within a somewhat larger list containing some persons who spoke with the authorities but who did not complain." (citation omitted)).

Thus, Birdair's suggested limitation would be inconsistent with the privilege's purpose. *See Massman-Johnson (Luling)*, 8 BNA OSHC 1369, 1371-72, 1980 CCH OSHD ¶ 24,436, p. 29,804-05 (No. 76-1484, 1980), citing *Quality Stamping Products Co.*, 7 OSHC 1285, 1288, 1979 CCH OSHD ¶ 23,520, p. 28,504 (No. 78-235, 1979) (holding that informer's privilege is not limited to individuals "who actually instigate investigations or act as confidential accusers in the criminal sense"). Indeed, the mere fact that an individual "supplied information relevant to the investigation of alleged OSHA violations makes the privilege applicable" because providing *any* information to the Secretary could lead to the retaliation the privilege is intended to prevent. *Massman-Johnson*, 8 BNA OSHC at 1373, 1980 CCH OSHD at p. 29,805. And we find that the phone records at issue here contain additional information, including the frequency and duration of the CO's communications with specific individuals, that suggests how much information each informer provided.[2]

[2] We also reject Birdair's contention that the court in *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, held that the content of a statement, including its "tone and manner," was necessary to reveal whether an individual is an informer, and that a list of names could never lead to such identification. 459 F.2d 303, 306 (5th Cir. 1972). In that case, the respondent had been provided with a list of employee-claimant names. The only issue was whether, having disclosed the names, the informer's privilege nonetheless protected the employees' statements

Therefore, we conclude that the Secretary has correctly asserted that the CO's phone records would reveal the identity of informers and that the informer's privilege protects those records from disclosure.

Substantial Need

Birdair argues that even if the informer's privilege applies to the CO's phone records, it has established a "substantial need" for these records because the Secretary has "methodically" used the privilege to hide the factual basis for the citations at issue and Birdair can only determine the factual basis by identifying who provided the CO with the relevant facts. *See Donald Braasch*, 17 BNA OSHC at 2085, 1995-1997 CCH OSHD at p. 43,869 (an employer can overcome the informer's privilege by showing that (1) it has a substantial need for the information that outweighs the government's entitlement to the privilege, and (2) the information is essential to the preparation of its case and it is unable to obtain it by any other means). But Birdair has not shown that the CO's phone records are its only means of discovering the information to which it is entitled.

First, Birdair has not demonstrated that it is unable to independently determine the names of all individuals who might have provided information to OSHA. Birdair admits that it knows the CO spoke with most, if not all, of the Birdair and general contractor employees who were at the site and Birdair knows the names of those individuals. Also, the Secretary has informed Birdair of the identities of all persons with knowledge of relevant facts of whom she is aware. Although Birdair asserts that it cannot verify that list, it would appear to be in a superior position to know who was at the site. By interviewing those individuals, Birdair would have access to the same sources of information as OSHA. The expense of interviewing the individuals is not a factor in the balancing test that determines whether Birdair can overcome the privilege, *see Charles Martin*, 459 F.3d at 307, and potential witnesses who might be reluctant to consent to depositions or to testify at trial would be subject to subpoena, *see* 29 C.F.R. § 2200.57.

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from disclosure. Finding that an informer's identity could be determined from seeing "the tone and manner" of the statements in question, the court concluded that the privilege applied. That holding is inapposite here, as the privilege has not been asserted before us with respect to the disclosure of any statements, and the phone records would lead to the identification of the informers. We also note, consistent with the Commission's decision in *Massman-Johnson*, that after an informer has testified on direct examination, Birdair is entitled, prior to cross-examination, "to obtain copies of statements in the government's possession relating to the subject matter of the witness's testimony." 8 BNA OSHC at 1378.

Second, Birdair has not shown why obtaining the names of individuals who gave information to OSHA is its exclusive means of obtaining information about the circumstances relevant to the citations. Indeed, it has already been provided with (1) statements from eyewitnesses to the accident taken by its insurance carrier; (2) statements taken by the general contractor; and (3) the transcript from the workers' compensation hearing for its injured employees. Therefore, we find that Birdair has failed to make the necessary showing to overcome the Secretary's assertion of the informer's privilege.

Accordingly, we vacate the judge's February 25, 2011 oral ruling and March 17, 2011 order denying the Secretary's Motion to Revoke Subpoena, and direct the judge to grant the Secretary's motion.

SO ORDERED.

__/s/_____
Thomasina V. Rogers
Chairman

__/s/_____
Horace A. Thompson III
Commissioner

__/s/_____
Cynthia L. Attwood
Commissioner

Dated: April 27, 2011

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SECRETARY OF LABOR,
Complainant,

v.

BIRDAIR, INC.,
Respondent.

OSHRC Docket No.: 10-0838

ORDER

On February 25, 2011, the court conducted a conference call with the parties to consider oral argument on *Respondent's Motion to Compel*, *Complainant's Objection and Response to Respondent's Motion to Compel Discovery from Complainant*, *Complainant's Motion to Revoke Subpoena*, and *Respondent's Response to Motion to Revoke Subpoena*. With regard to *Complainant's Motion to Revoke Subpoena*, the motion is GRANTED in part and DENIED in part as follows:

Respondent's subpoena *duces tecum* to Cellco Partnership d/b/a Verizon Wireless is overly broad in temporal scope. The court hereby reduces the breadth of the subpoena to calls made or received between the date of the accident giving rise to the subject OSHA inspection (December 3, 2009) and the date Complainant was granted leave to amend its citation (February 11, 2011). Subject to this modification, Complainant is ORDERED to produce the requested telephone records to Respondent but is GRANTED LEAVE to redact all telephone call references which do not relate to the subject inspection. The parties are further directed to work together in good faith to resolve the logistics of whether the records will be produced directly from Cellco Partnership d/b/a Verizon Wireless or obtained by CSHO Rodriguez, as well as any cost issues related to obtaining the records.

SO ORDERED. **/s/**

JAMES R. RUCKER, Jr.
Judge, OSHRC

Date: March 17, 2011